State of Michigan

In the Supreme Court

Appeal from the Court of Appeals
Neff, P.J. and O'Connell and R.J. Danhof, JJ

Tony J. Daniel,

Plaintiff-**Appellee**,

vs.

State of Michigan
(Department of Corrections),

Defendant-**Appellant**.
_____/

Docket No: 120460

COA Docket No. 224423

WCAC Docket No. 99-0063

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS INVOLVED

I.

CAN THE WORKER'S COMPENSATION APPELLATE COMMISSION TOTALLY DISREGARD SUPREME COURT PRECEDENTS, i.e. Thomas v Certified Refrigerator, Inc., 392 Mich 623; 221 NW2D 378 (1974) and Crilly v Ballou, 353 Mich 303; 91 NW2D 493 (1958) and Calovecchi v State of Michigan, 461 Mich 616; 611 NW2d 300 (2000).

PLAINTIFF-APPELLEE SAYS "NO".

DEFENDANT-APPELLANT SAYS "YES".

COUNTER STATEMENT OF FACTS

Plaintiff, Mr. Tony Daniel, is employed by the State of Michigan as a probation officer (TR 26). As a probation officer, Mr. Daniel would supervise convicted felons, if they were deemed appropriate for probation by the (circuit) court (TR 27). Mr. Daniel was responsible for each case assigned to him (TR 28). As part of the sentencing of the court, each convicted felon is given guidelines or standards which they are to follow (TR 29). It was Mr. Daniel's job to monitor the convicted felons probationary period to assure adherence to the sentence imposed (TR 30).

Mr. Daniel was first employed by the State of Michigan in February of 1983 (TR 30). He transferred into the Department of Corrections on November 5, 1984 (TR 31). Since that date he has been a probation officer (TR 31).

Mr. Daniel's duties as a probation officer required him to have periodic meetings with these convicted felons and log these meetings in his record book (TR 31, 32). When a convicted felon assigned to Mr. Daniel violated the terms of his probation, Mr. Daniel would submit a report to the assigned Judge concerning the probation violation and obtain a court date (TR 33, 34). After the court date is obtained, the defenders office is notified in order that the convicted felon, or probationer, can have proper representation (TR 34). When a probationer fails to appear at a scheduled court hearing, a bench warrant is issued for his or her arrest (TR 35). Eventually the convicted felon, who has now become a probation violator, is arrested and put in jail (TR 36). The original hearing on the probation violation is then held after notification of counsel (TR 36, 37). Mr. Daniel's estimated that he would have somewhere between five and ten instances per month wherein a court hearing would be scheduled due to the non compliance of a

probationer (TR 39). In that there was a defense attorney involved, these hearings were adversarial in nature (TR 39).

On February 10, 1995, Mr. Daniel was involved in a court hearing brought on by the fact that one of his probationers was arrested on a bench warrant and subsequently incarcerated (TR 42, 43). The hearing was held in Kent County Circuit Court before Judge Benson (TR 43). The probationer, nee convicted felon, was assigned Ms. Gayle Brennan as his defense attorney(TR 43). Mr. Daniel advised the Circuit Court that he could be reached in a staff meeting when the court was ready to proceed with the probation violation hearing (TR 44). Upon contact with the court, Mr. Daniel left the staff meeting and was soon confronted by defense attorney Brennan (TR 44). Words were exchanged between Mr. Daniel and Ms. Brennan regarding what was said to her client (Ms. Brennan's client was insisting that Mr. Daniel told him not to attend these meetings), and that the client did not have written documentation supporting his allegations (TR 48, 50). Following this confrontation, Judge Benson met with defense attorney Brennan and Mr. Daniel in chambers (TR 51). At the conclusion of this meeting, it was the understanding of Mr. Daniel that with a guilty plea, probation would be continued and jail time would be limited to time served on the bench warrant (TR 53). Following this meeting, defense attorney Brennan went to lock-up and spoke to her client (TR 53).

The court hearing was held after Ms. Brennan met with her client, wherein the probationer pled guilty (TR 54). Following the guilty plea, the court inquires as to whether any promises were made to him (TR 55). To which the probationer responded, "yes" (TR 55). When Judge Benson heard this, he (Judge Benson) became upset. He stopped the proceedings, put the probation violator back in jail and gave him bond (TR 55). Defense attorney Brennan attempted to intercede, but Judge Benson already had made up

his mind, closed the hearing and sent her client back to jail (TR 55). Another court hearing was scheduled for two or three days later (TR 56).

Following the aborted hearing, defense attorney Brennan went up to Mr. Daniel, poked her finger into his chest and told him that "she would have my job" (TR 58). Eventually the hearing was held, the probation violator pled guilty, advised the court no promises had been made to him and was sentenced to time served (TR 60).

Later that month, Mr. Daniel was informed by Ms. Price, his supervisor, that defense attorney Brennan had filed a complaint against him (TR 61). This complaint basically alleged sexual harassment (TR 64). Mr. Daniel was amazed. His supervisor informed him that the complaint must be in writing and she had requested a written complaint. She told Mr. Daniel's that he did not have to do anything until a written complaint was received.

Shortly thereafter, Ms. Price not only received a written complaint from Attorney Brennan, but she also received written complaints from some of Attorney Brennan's cohorts. After Mr. Daniel's supervisor received the written complaints, she initiated her investigation. Ms. Price asked Mr. Daniel to respond in writing to a series of questions she drafted following reviewing the written complaints of Attorney Brennan and her cohorts. Mr. Daniel immediately answered her written request.

In her continuing investigation, Ms. Price then went to Attorney Brennan and her cohorts with additional questions. She was given the response that "they had provided her with enough information, and if she continued to stone-wall, they were going to report her to Judge Kolenda" (Chief Judge at the Kent County Circuit Court). As soon as Ms. Price received that threatening communication, her investigation was stopped immediately, and charges were brought against Mr. Daniel for sexual harassment. Mr. Daniel,

as a Union member, was represented by his Union at this hearing. His Union advisor told Mr. Daniel that these charges were bogus and he should say nothing at the hearing, and he would be vindicated. The hearing was held, Mr. Daniel upon the advise of his Union representative, said nothing, and he was suspended for ten [10] days.

Mr. Daniel did not find out the outcome of the hearing immediately. He was to receive a written decision in the mail at the same time the other parties were informed of the decision. One Monday, Mr. Daniel appeared at work and was immediately approached by his supervisor, inquiring as to what he was doing there, as he had been suspended for ten [10] days. Apparently, Mr. Daniel's decision was still at the U.S. Post Office on that Monday morning. Mr. Daniel left work, retrieved his mail from the post office and was in a state of utter amazement.

Following his ten [10] day suspension, Mr. Daniel did return to the work place and resumed his duties as a probation officer. He continued seeing the defense attorneys on a day-to-day basis. His supervisor treated him differently. His work, during the ten [10] day suspension was not done, and he was immediately behind. His supervisor began commenting upon his back-log and would make suggestions for his work performance that had not been made prior to these charges. The worse thing that happened upon his return, was his continued interaction with the defense attorneys. One day, Attorney Brennan seeing him in the court room, made a sexually inappropriate remark in his presence. The remark Ms. Brennan made while discussing the inadequacies of men, was that "I've gotten rid of my sperm donor".

Mr. Daniel, of the mind that what is good for the goose is good for the gander, reported this incident to his supervisor. His supervisor's response was one of total disregard. Nothing would be done about the inappropriateness of her comments, even though Mr. Daniel had been similarly suspended for

ten [10] days. As his work activities continued and he continued to interact with the defense attorneys, and continued to be singled out by his supervisor for insignificant incidences, Mr. Daniel began to feel worse and worse. He began treating with Dr. Daniel DeWitt, a psychologist. Over time his condition worsened due to these work experiences. Finally, during a session with Dr. DeWitt, Mr. Daniel confided in the doctor that the sexual harassment charge, shoddy investigation, and subsequent treatment was culminating into a point where he worried that he would take a gun into the work place. Dr. DeWitt removed him from the work place.

Mr. Daniel continued to treat with Dr. DeWitt and applied for workers' compensation benefits. He was seen by a plethora of doctors on behalf the State of Michigan. Mr. Daniel, in addition to Dr. DeWitt, was seen by Dr. Kremer and Dr. Berger in close proximity to his going off of work. Both doctors continued Mr. Daniel on an off-work status. Workers' compensation benefits were disputed and a petition was filed and the case was ultimately tried before Magistrate Winston Wheaton. Magistrate Wheaton found a work related injury and a period of disability until Dr. DeWitt returned Mr. Daniel to his employment. Defendant's timely appealed this decision.

The Defendant filed a timely appeal to the Workers Compensation Appellate Commission. The Appellate Commission noted that Magistrate Wheaton had decided the facts of the case correctly. They went on to note that he had interpreted the law correctly. After making these two observations, they reversed his decision. Plaintiff requested and received appropriate relief from the Court of Appeals. Defendants have now appealed to The Supreme Court.

I. STANDARD OF REVIEW

The Magistrate's findings are to be considered conclusive "if supported by competent, material and substantial evidence on the whole record." MCL 418.861a(3); MSA 17.237(861a)(3). Magistrate Winston Wheaton found as fact that Mr. Daniels was injured in the course of his employment, that injury caused a disability and that disability resulted in wage loss.

The Defendant's requested the Appellate Commissioner to go outside the statute in reviewing the fact finding and to arrive at their own decision as to whether or not Plaintiff should prevail, and wrongly received this relief. The Appellate Commission provided relief that the statute does not allow. The facts in this case are clear. There was little dispute as to the fact that charges were brought against Mr. Daniel, by not one but several attorneys. There is no dispute as to the fact that the incidents mentioned were all several months to several years in the past. There is little dispute that the defense attorney Brennan rounded up her cohorts to file their written complaints shortly after the hearing in front of Judge Benson on February 10, 1995. There is no dispute that the hearing "blew up" after Ms. Brennan's client told the Judge that promises had been made to him in exchange for a guilty plea. There is no dispute that Ms. Brennan tried to intercede with Judge Benson to help her client from being sent back to jail, but was not successful. There is little dispute that Ms. Brennan poked Mr. Daniel in the chest and told him that "she would have his job". There is no dispute about the investigation of Ms. Price. There is no dispute that Mr. Daniel answered all question she might have had. There is no dispute that Ms. Price tried to obtain additional information from the complaining defense attorneys, only to be threatened with the power of a Circuit Judge. There is no dispute that upon the threat of the defense attorneys, the investigation was

immediately terminated and charges were brought against Mr. Daniel. Presumably, the information Ms. Price felt was important enough to schedule more fact finding sessions, paled in comparison to these threats.

There is no dispute that a hearing was eventually held. There is no dispute that Mr. Daniel, relying on the advise of his Union representative, basically stood mute. There is no dispute over the subsequent suspension. There is no dispute that Mr. Daniel was not informed of his suspension on a timely basis and was told of his suspension while at the workplace, performing his work duties. There is no dispute concerning Mr. Daniel's subsequent job activities and stresses. There is little dispute over the action of his supervisors upon his return from his suspension. There is little dispute over the offensive statement that defense attorney Brennan made in his presence as to the "getting rid of her sperm donor". There is no dispute that Mr. Daniel reported this to his supervisor and was summarily chastised as being a whiner and a trouble maker. There is no dispute as to the necessity of treatment Mr. Daniel's received at the office of Dr. DeWitt and of the fact that Dr. DeWitt removed Mr. Daniel's from the workplace. Due to the fact that the Defendant, on page 30 of their Appellate Commission brief, admit (the brief actually states "does not dispute") that Mr. Daniel's personal injury, his temporary depression, arose in the course of his employment, it is not necessary to address the ongoing treatment of Mr. Daniels, nor the various other medical evaluations. It should be further noted that the Defendant's Appellate Commission brief does not dispute the findings of Magistrate Wheaton to continue disability benefits until the return to work of Dr. DeWitt.

The factual findings of Magistrate Wheaton cannot be disturbed if supported by competent, material and substantiated evidence on the whole record. The Appellate Commission, in their decision, complemented Magistrate Wheaton on not only his fact finding, but his legal analysis. Their decision should

have ended at that point with an affirmation. Instead, they went outside their statutory limits in an attempt to either change the law or anticipate the findings of the Supreme Court when it decided Calovecchi v State of Michigan,223 Mich App 349;566 NW2D 40(1997); 461 Mich 611, 616; NW2D 300 (2000).

Given the standard of review, the appellate process must adopt the factual findings of Magistrate Wheaton. Magistrate Wheaton found an injury date of February 2, 1996. Magistrate Wheaton awarded benefits to Mr. Daniel for disability resulting from an injury that occurred on that date. There have been no allegations by Defendant that Mr. Daniel sexually harassed anyone on the injury date found by Magistrate Wheaton. On the contrary, Defendants allege that Mr. Daniel sexually harassed Ms. Gayle Brennan on February 10, 1995. On page three of his opinion, Magistrate Wheaton specifically stated that "February 10, 1995 has no significance in this case whatsoever". On page thirteen of his opinion Magistrate Wheaton summarized his findings stating that "Plaintiff's discipline and post discipline employment events up to February 2, 1996 contributed in a significant manner to his development of a disability condition of depression, anxiety and uncontrolled anger". The operative injury date of February 2, 1996 does not involve sexual harassment, but is concerned with the past discipline and post discipline work events that triggered the disability of Mr. Daniel. Magistrate Wheaton was even handed in his assessment of the parties and the witnesses stating that Ms. Brennan "would be well advised to check the glass content of her own house" on page five of his opinion.

Throughout the decision of the Appellate Commission, they discuss the fact that Plaintiff was profiteering. First of all, there is no evidence on the records that supports that contention. The Appellate Commission should not be engaging in fact finding, they should be determining whether the fact finding of the Magistrate can be supported by the record. Secondly, the fact finding of the Appellate Commission

regarding this profiteering is erroneous. Injured workers do not profit from being on workers compensation. The injured worker immediately loses at least twenty percent (20%) of his take home pay. After that he or she additionally will lose any raises, overtime or cost of living increase that might have been applicable. The Worker's Compensation Appellate Commission loses sight of the fact that Mr. Daniel's was disciplined for his alleged transgression and received ten days off. It was this discipline, along with the fact that his antagonists shut down the investigation by threatening his employer with the power of a Circuit Court Judge, his treatment by his antagonists following his return to work and the treatment he received at the hands of his employer upon his return to work, all taken together which culminated in his disability. Additional fact finding of the Appellate Commission which should be totally disregarded would be that Mr. Daniel failed to cooperate with the investigation process, when in fact it was his accusers actions that ended this investigation.

Mr. Daniel promptly answered any questions that his supervisor had in writing. His supervisor, when she testified at trial in an apparent attempt to gloss over the fact that her investigation was terminated by the actions of the defense attorneys, from whom she was attempting to get more information, kept repeating that Mr. Daniel was asked several times that he could add any information he wanted. This is totally self-serving when taken in the context of this case. It was not Mr. Daniel's non-cooperation with her investigation that led to charges, it was the complaining attorneys threats that stopped her investigation. One wonders why these charges were even brought forward if the investigation needed more evidence or information when access to that evidence or information is denied. It should be noted that while this case was pending at the Court of Appeals, the Supreme Court of the State of Michigan, did decide Calovecchi v State of Michigan, 461 Mich 616, 611 NW2d 300 (2000).

II. THE PRECEDENT OF CALOVECCHI V STATE OF MICHIGAN

The holding in Calovecchi v State of Michigan, 223 Mich App 349; 566 NW2D 40 (1997); 461 Mich 616, 611 NW2D 300 (2000), was that a mental injury caused by a suspension could be found to arise out of and in the course of employment and therefore be a compensable claim. The Calovecchi case, contrary to the Worker's Compensation Appellate Commission's interpretation, makes no distinction between the degrees of discipline (extreme or ordinary) nor does the court distinguish between proven and unproven allegations. The Appellate Commission observed in Ream v County of Muskegon, 1998 ACO 685 that the court assumed a disciplinary action was for legitimate purposes and the only distinction between types of discipline is between those intended as acts of termination of employment and those which are not. The Calovecchi case did not turn upon the Plaintiff's guilt or innocence of the alleged misconduct.

A psychiatric disability caused by a demotion may be compensable, VanderMolen v Dean Foods, 1990 WCACO 1022. Case law is clear that a termination is not compensable because it is intended to be final. The discipline imposed in the present case was clearly not the equivalent of a termination. A suspension is not intended to be final because it is contemplated that the individual will return to work and would therefore be compensable. A point of fact is that Mr. Daniel did return to work following his suspension.

Defendant argues that the Plaintiff's mental injury did not arise out of and in the course of his employment. MCLA 418.301; MSA 17.237, states that for an injury to arise out of and in the course of employment so as to be compensable through worker's compensation, it must result from the work itself or from stresses, tensions and associations of the working environment, human as well as material. It further states that it is compensable when it occurs as a circumstance of or incident to the employment relationship.

The Magistrate found that actual employment events occurred, the disciplinary process and it consequences, and judged the significance of those events against all circumstances in determining that the Plaintiff's mental disability was compensable. The Magistrate noted that Calovecchi's salient principle was that acts of discipline not intended to be the equivalent of termination qualify as actual events of employment upon which a claim for work related disability may rest.

The fact that there is no nexus between the alleged sexual harassment and the duties of a probation officer is of no significance. Similarly, there was no nexus in Calovecchi between allegedly hitting a family member and threatening another family member with a gun with the duties of a police officer. The nexus in both cases is found in the discipline and consequences thereof.

The majority of the Workers' Compensation Appellate Commission disregarded the decision of the Court of Appeals in Calovecchi when it reversed Magistrate Wheaton. This case was before the Supreme Court at the time of the Appellate Commission's decision. The majority of the Appellate Commission was apparently confident of the Supreme Court overturning the Court of Appeals in Calovecchi and decided to beat them to the punch on this case as the facts are nearly identical.

The Michigan Supreme Court decision in Calovecchi affirmed the Court of Appeals and reversed the Workers' Compensation Appellate Commission. The Supreme Court sated in Calovecchi:

> "Given the plain language of subsection 301(1), we cannot extend Robinson to this case on the ground that it would be "bad policy" to do otherwise. To do so, we would have to conclude that mental injuries stemming from acts of employer discipline (and other similar employer acts) do not, as a matter of law, "aris[e] out of and in the course of employment." Justice Talbot Smith, commenting on the concept of "course of employment" under WDCA explained that an injury is "compensable" if it "results from the work itself, or from the stresses, the tensions, the associations, of the working environments, human as well as material . . ." *Crilly v Ballou, 353 Mich 303, 326; 91 NW2D 493 (1958).* Certainly, acts of employer-imposed discipline are a predictable part of the working environment.

> Accordingly, their removal as a possible cause of compensable injury would be inconsistent with our longstanding interpretation of subsection 301(1) of the WDCA. Id."

In the instant case Mr. Daniel was disciplined by his employer. Following the discipline Mr. Daniel returned to work and was subjected to other work place events, which taken in conjunction with his discipline caused him to decompensate to the point of disability according to his treating doctor. Magistrate Wheaton determined that there was a factual basis and a legal basis for workers' compensation benefits to be granted. The Appellate Commission agreed with both his factual and legal analysis. Yet the majority of the Appellate Commission reversed the decision. The only plausible explanation for this reversal is that the Appellate Commission had a feeling that Calovecchi would be reversed by the Supreme Court. They were wrong.

III. CAN THE WORKER'S COMPENSATION APPELLATE COMMISSION TOTALLY DISREGARD SUPREME COURT PRECEDENTS, i.e. Thomas v Certified Refrigerator, Inc., 392 Mich 623; 221 NW2D 378, 385 (1974) and Crilly v Ballou, 353 Mich 303; 91 NW2D 493 (1958).

The decision of the Appellate Commission failed to recognize or acknowledge pre-existing case law regarding misconduct. The Appellate Commission feels that the conduct of the Plaintiff is critical in the receipt of workers' compensation benefits. The Supreme Court has already dispelled that notion. In Thomas v Certified Refrigeration, Inc., 392 Mich 623; 221 NW2D 378, 385 (1974). Using the same analogy as Magistrate Wheaton, the court stated "in fact it might be said that workers' compensation, like the gentle rain from heaven, falls upon the just and unjust alike". In a footnote following the Supreme Court goes not to state "in this regard it is important to distinguish workers' compensation from unemployment compensation. The latter (unemployment compensation) is properly grounded on a theory of fault in which compensation is denied when the fault of an employee is established, but in workers' compensation cases questions of fault have no place in the deliberations on the issue of compensation."

The landmark misconduct case would be Crilly v Ballou, 353 Mich 303; 91 NW2D 493 (1958). The Supreme Court held that the scope of employment generally includes all the activities that one can reasonably expect a person to engage in during his or her work, regardless of whether they further the employers business. The Crilly question then becomes whether or not it is reasonable to expert sexual banter to occur between men and women in the workplace. All of us who are in the workplace realize that this activity does occur.

Particularly distressing is the level of alleged sexual harassment in this case. There was no physical touching. One would expect much worse would be the basis for these allegations. The basis for the

allegations are words and words alone. The majority of the allegations from the defense attorneys are not even recent words, but words that hold little if any effect when uttered. Upon recall, these words and phrases can be manipulated to mean a completely different message than delivered during the conversation. In hindsight, the Union representative of Mr. Daniel who told him that he had nothing to fear was wrong. Given the tenuous nature of the allegations, it is easy to see why he was overconfident.

The majority of the Appellate Commission dispose of Crilly (the landmark Supreme Court case) in a footnote. The majority apparently feels Crilly has no bearing under Section 305. If the research of the majority would have been as thorough as the dissent, they would have discovered that the annotation of Section 305 prominently displays Crilly. Along with several other cases where an injured worker's rights to benefits were upheld, see Shepard v Brunswick Corp., 36 Mich App 307, 193; NW2D 370 (1971), Beaudry v Watkins, 191 Mich 445; 158 NW 16 (1916), Hipner v Stuart, 217 Mich 512; 187 NW 374 (1922), to name a few. Gross negligence of the injured worker has even been held by the Supreme Court as not being cause to preclude recovery of workers compensation. Day v Gold Star Dairy, 307 Mich 383; 12 NW2D 5 (1943). Clearly the allegations Plaintiff was charged with do not rise to gross negligence. The apparent argument of the Defendants is that Mr. Daniels' actions are so egregious and that the consequences of his actions so apparent that his workers' compensation benefits should be denied. In other words, Mr. Daniel, who disputed the allegations, should have known that sexual banter in the workplace would lead to charges of sexual harassment, would then lead to an investigation of those charges which was cut short by the accuser threatening to go over the investigator's head, would then lead to a hearing, would then lead to being advised by his union representative that these charges are so bogus that you do not have to respond, would then lead to an adverse decision, would then lead to an untimely

discovery of the hearing decision, then lead to being told of the decision while in the office and being sent home in shame (a la Calovecchi), then lead to being harassed at work by his accusers, then lead to being harassed at work by his supervisor, then lead to having no support from his supervisor when acts of sexual banter were aimed at him, finally culminating in the need for psychological counseling. This cause and effect phenomenon is not foreseeable.

The original enactment of Workers' Compensation legislature was an attempt to allow medical bills and wage loss benefits to be promptly paid to injured employees. Employers were assessing each injury as to whether or not the employee was "at fault". If the employer arrived at the determination that the employee was "at fault" they refused to pay. The legislature did away with those case by case reviews as to fault and enacted legislature which called for the payment of economic losses (medical bills and wage loss). At that same time shielding the employer from claims for non-economic damages through the exclusive remedy provision of this legislature. Based upon the fact finding of Magistrate Wheaton which was endorsed by the Appellate Commission and the Court of Appeals these benefits should now be paid to Mr. Daniel.

IV. RESPONSE REQUIRED AS A RESULT OF THE AMICUS CURIAE BRIEF

An amicus curiae brief has been filed in this case. One aspect of this brief has done a disservice to this case and to this Court in its attempt to politicize this case. An editorial from the Grand Rapids Press was included in this brief. This editorial is completely irrelevant, but once a bell has been rung, it cannot be unrung.

A responsive letter to that editorial was forwarded to the Grand Rapids Press in the hopes of being published as a letter to the editor. It was not, but a rather spirited reply from the Editor himself was received. By this time it had been determined that this editorial had been conceived at a Christmas cocktail party through information provided by an individual with limited knowledge of the facts. Awareness of this situation was provided to the Editor, no response from the Editor has been forthcoming. The correspondence that was exchanged is found at pages B1 through B3 of the Appendix.

RELIEF REQUESTED

Plaintiff requests that the Supreme Court affirm the decisions of the Court of Appeals and Magistrate Wheaton.

DATED: September 25, 2002

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